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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 585.

JEANNETTE A. NOEL, CATHERINE A. BROWN, PAULINE A. LANDIS, ROBERT L. ACKLEN, *Petitioners,*

v.

EDSON B. OLDS, JR., and AMERICAN SECURITY AND TRUST COMPANY OF WASHINGTON, D. C., Executors and Trustees Under the Will of William Hayes Ackland, Deceased; ROLLINS COLLEGE, a Corporation, and UNIVERSITY OF NORTH CAROLINA, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BRIEF STATEMENT OF CASE.

William Hayes Ackland, a resident of the District of Columbia, bequeathed his entire estate of approximately $1,400,000.00 to respondents Olds and American Security and Trust Company, *as trustees,* with directions to erect a memorial art museum on the campus of Duke University at Durham, North Carolina, to cost not to exceed $300,000.00, and to use the income from the balance of the corpus to maintain the museum, to buy art objects for exhibition therein, and later to enlarge the building. Petitioners, his next of kin, filed suit to have the trust declared invalid. Thereafter, Duke University renounced the provisions of

the will, and it thereby became impossible to perform the charitable trust in the exact manner therein prescribed. The trial judge held that the will created a valid charitable trust but that the declination of Duke University having made the trust impossible of performance *in the exact manner set forth in the will*, the trust thereby failed, because in his opinion the doctrine of judicial *cy pres*, under which the trust might have been preserved, was not in force in the District of Columbia (R. 87). From the portion of the judgment which ordered the destruction of the charitable trust respondents took appeals to the United States Court of Appeals for the District of Columbia, and the decree of the trial court was reversed (R. 102-110). The opinion is reported in 138 F. 2d 581.

With respect to the points raised by the petitioners herein, the following occurred in the Court of Appeals:

1. Petitioners contended in their motion to dismiss all appeals except their own that respondents Olds and American Security and Trust Company, as trustees under the will, and respondents Rollins College and University of North Carolina, as possible successors to Duke University in carrying out the trust, had no standing to appeal as aggrieved parties. Stated otherwise, the questions raised by the motion to dismiss were:

A. Whether trustees of a perpetual charitable trust were aggrieved by and might appeal from a judgment construing a will and holding that the trust had terminated for want of power in the equity court either to substitute a new associate trustee to act with the principal testamentary trustees or to carry out the trust *cy pres;*

B. Whether Rollins College and the University of North Carolina, alleged by the trustees' counterclaim and admitted by petitioners' motion for judgment on the pleadings, to be the southern educational institutions next in line in the mind of the

testator to administer the charitable trust created in the will in lieu of Duke University (R. 27-28), are aggrieved by and might appeal from a determination by the District Court that the doctrine of *cy pres* is not in force in this jurisdiction.

The Court of Appeals denied the motion to dismiss after consideration of very full briefs on the point (R. 110 and Transcript pp. 101-132, 135-160).

2. Petitioners contended the doctrine of judicial *cy pres* was not in force in the District of Columbia. The Court of Appeals decided that it was (R. 106-108).

3. Petitioners contended that the trust established by the will was not charitable in nature. The District Court and the Court of Appeals both decided that it was (R. 87, 90, 105-106).

4. Petitioners contended that no general charitable intent could be found *in* the will, and that no source of information outside the will could be used. The Court of Appeals held that where *the will*, which created a testamentary trust for the erection of an art museum on the campus of Duke University, contained *express language* directing the testamentary Trustees to look to other sources, well known both to the testator and the Trustees, to guide them in carrying out the spirit of his intentions, the *written instrument* indicated that the testator did not intend to make a gift to Duke University as a single beneficiary, but intended that in the event of rejection by that University the trust purposes should be carried out in connection with some other southern university (Court's Opinion, p. 8, R. 109). The Court below also stated that "to divert his estate to his relatives would violate the first expressed and most positively stated intention of his will" (Court's Opinion, p. 9, R. 110) and "that the paramount, dominant and primary purpose of the testator was to give to charity generally" (Court's Opinion, p. 5, R. 106). *Thus, the Court below found from the language of the will itself that the Testator*

manifested a general intention to devote his estate to certain charitable purposes and not to make a specific gift to Duke University.

SHORT ANSWER TO CONTENTIONS OF PETITIONERS.

The Court of Appeals for the District of Columbia decided questions of *local law*, purely of *local interest*, involving the construction of a will of a resident of the District of Columbia and the administration and validity of private charitable trusts. Petitioners' points clearly do not present questions of general importance and are not reviewable by this Court under the provisions of Supreme Court Rule 38 (c) and applicable decisions.

Respondents feel that the foregoing is sufficient to justify denial of the Petition. The summary statement and argument which follow are merely for the purpose of correcting, in fairness to the court below, certain impressions sought to be conveyed in petitioners' brief.

FACTS.

The Will of William Hayes Ackland (R. 6-14) contained the following provisions:

> "ITEM I: I am free from any moral obligation to any of my kindred and at liberty, not only according to law, but according to every principle of natural right, to do whatever I choose with my own property. All of my nearest relatives being already provided with the comforts of life and having no claim whatever upon me, I make no bequest to any of them, except as hereinafter appears. No influence has been brought to bear upon me in the making of this my last will and testament and none of the beneficiaries herein named has any knowledge concerning the manner in which I intend to dispose of my estate.
>
> "I urge upon my executors and trustees, hereinafter named, to carry out as nearly as possible the spirit of

my intentions as expressed herein and as may be expressed to them by other means."

* * * * * * * * *

ITEM VII:

* * * * * * * * *

"(c) I direct my trustees to have erected upon the campus of said Duke University, at Durham, North Carolina, as soon after my death as arrangements therefor can reasonably be completed, a memorial building in the form of a gallery or museum, to include an apse for the interment of my remains, to be known as the 'William Hayes Ackland Memorial', substantially in accordance with plans for such a museum which said Duke University has heretofore submitted to me. I direct that the cost of said building shall be as estimated by the architect who prepared said plans, approximately Two Hundred Fifty Thousand Dollars ($250,000.00), but in no event more than Three Hundred Thousand Dollars ($300,000.00). When said Building shall have been completed, I direct that my remains be transferred to the apse which is to be a part thereof, for permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building, on permanent exhibition, all of my tangible personal property and effects preserved for that purpose in accordance with the provisions hereinbefore contained, and such other objects of art as may be added thereto as hereinafter provided.

"(d) The entire balance or remainder of my residuary property and estate aforesaid, including the net proceeds of sale of such of my tangible personal property and effects as may have been sold in accordance with the provisions hereinabove contained, and including also the proceeds of sale of my manuscripts and/or royalties received in respect thereof, shall be held by my trustees with full discretionary powers of management, of sale and resale, in fee simple or otherwise, of investment and reinvestment, of exchange and of changing investments, and, after paying all such costs, charges and expenses as they may deem necessary or proper in the administration of this trust, my trustees

shall allow the net income arising therefrom to accumulate in their hands and shall invest and reinvest the same in accordance with the powers hereinabove set out, but such accumulations and the investments thereof shall be kept in a separate fund, from which there shall be paid such thereof as may be necessary to carry out the following directions, namely:"

(Subparagraphs (d) 1 to 6 provide for certain private or minor bequests not pertinent here)

"7. After the completion of the building provided for in subitem (c) of this ITEM VII of my will, and after the fulfillment of all of the requirements upon the accumulated income from my trust estate the entire remainder of such accumulated income shall be used and applied by my trustees for the perpetual maintenance and upkeep of said building and its contents, and for the acquisition of such objects of art as may be selected and designated by the governing body of Duke University, which objects, when acquired, shall be placed in said building on permanent exhibition, as well as for the enlargement of such building at such time or times as, in the judgment of my trustees, the enlargement thereof shall be feasible.

"8. I hereby give to my trustees full and complete discretion in connection with the administration of my trust estate and in carrying out the directions hereinabove contained, especially those in regard to the construction of the building hereinbefore provided for, and I direct that their decision in regard to any matter arising out of their administration shall be binding and conclusive upon all concerned."

After petitioners, who are next of kin of the testator and who would have received by intestacy property not disposed of by a valid will, had filed a civil action for "construction" of the will, Duke University renounced the benefits, burdens and responsibilities of the trust (R. 16, 29-30). Responsive pleadings then were filed by the trustees under the will and by the other parties defendant, including a niece of decedent who as next of kin would have benefited through destruction of the trust, but who has not joined in

the petition for certiorari. The trustees alleged in their counterclaim that the will, "on its face," indicated "a general charitable purpose of advancing the cause of art and public education" and they asked that the University of North Carolina or Rollins College, non-profit educational and charitable corporations, be appointed to administer the educational and charitable trust provisions of the decedent's will therein directed to be administered by Duke University (R. 26-28). The question from that point forward was whether the doctrine of judicial *cy pres* could be invoked in this case to preserve and carry out the terms of the trust which had become impossible of performance in the exact manner prescribed by the will.

Rollins College, an original party defendant to the suit because named in the will to administer an annual scholarship award (R. 11), filed a claim for consideration as next in line in the testator's wishes (R. 57-60), and the University of North Carolina asserted a similar intervening claim (R. 64, 71-77).

The trial judge, on a motion by petitioners for judgment on the pleadings, decided that the will did create a valid charitable trust (R. 87, 90), but reluctantly, and expressing the wish that his decision would be reversed (R. 80, 83), held that the renunciation of Duke University terminated the trust, because he considered that the doctrine of judicial *cy pres* had been held inapplicable in the District of Columbia (R. 87-88). The trustees under the will, Rollins College, and the University of North Carolina, all of whom are respondents here, took appeals to the Court of Appeals for the District of Columbia.

Petitioners filed a motion for dismissal of these appeals, the nature of which is hereinafter discussed.

The conclusions of the Court below are most clearly stated in the opinion itself (R. 102-110). Briefly, after reviewing the will and some of the circumstances which surrounded the testator at the time of its execution, the Court

held that the doctrine of judicial *cy pres* is in force in the District of Columbia, and that the will of William Hayes Ackland and the impossibility of performing the trust in the exact manner designated provided an appropriate occasion for the exercise of that doctrine.

ARGUMENT.

Petitioners' Motion to Dismiss the Appeals Below Was Entirely Without Merit and Was Properly Denied.

In their brief in support of the petition for certiorari petitioners seek to create the impression that they were deprived of opportunity to challenge the jurisdiction of the Court of Appeals—that the Court ignored their motion to dismiss the three appeals of respondents. A review of what occurred below is therefore necessary out of fairness to the Justices of the Court of Appeals who heard and decided the case and to indicate that petitioners' claim is unfounded.

Petitioners joined as defendants the trustees named in the will, Duke University, the individual legatees under the will, and Rollins College (for reasons already noted). The University of North Carolina filed a motion for leave to intervene. After the renunciation of Duke University, the trustees in protection of the trust, and the other two institutions claiming as next in line to Duke University, asserted in their responsive pleadings that the trust had not failed, but should be carried into effect *cy pres* (R. 17, 27-28, 58-59, 71-75).

The trustees, Rollins College and the University of North Carolina filed separate appeals from the ruling adverse to *cy pres* administration of the trust. The judgment of the District Court directing the termination of the trust ultimately was found by the Court below to be erroneous on the merits. In the meantime, however, petitioners moved to dismiss the appeals on the ground that the respondents had

no standing to appeal, in that they were not parties "aggrieved" within the meaning of the statute establishing the jurisdiction of the Court of Appeals. Their brief in support of the motion (Tr. pp. 101-132) relied on cases in which stakeholders in interpleader proceedings, or executors seeking instructions for the distribution of property in their possession as between ascertainable rival *sui juris* claimants, were held to be without standing to appeal, and they also relied on other cases holding that individual members of the general public had no standing to enforce the proper administration of charitable trusts. To complete the exclusion, they also contended that no public officer had authority to represent the beneficiary interest. In other words, petitioners contended that although the trust might have been erroneously destroyed by the trial court's decree, none of the parties to the suit had standing to appeal from that error and there was no one else who could do so.

In the Court below, petitioners filed a brief and a reply brief, containing a total of forty-six pages, directed solely to the points raised by the motion to dismiss. That Court has a rule,[1] similar to Supreme Court Rule 7, sec. 2,[2] which provides that no oral argument shall be heard on motions without direction of the court. It is the practice to request such argument when desired. Petitioners asked for no such opportunity. When the case was called for final argument, their counsel addressed himself to the merits and simply stated that other points were being submitted on the briefs. After the decision, no petition for rehearing or reconsideration was filed. And in the opinion, the Court below specifically stated that action upon the motion had been postponed until the case could be heard upon its merits and that the

[1] Rule 31 (j) of the Court of Appeals for the District of Columbia: "No Oral Argument Permitted. Such petitions and motions shall be considered and ruled upon in chambers, and no oral argument thereon will be permitted unless directed by the court."

[2] "Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed."

motion was denied (R. 110). To say that the court ignored the challenge to its jurisdiction or to suggest that there was any want of opportunity to present the question is contrary to the fact. The conduct of petitioners after the filing of their reply to oppositions to the motion to dismiss is much more consistent with an intention to abandon the point. In the light of these facts it is a serious thing for counsel to suggest that the court below was arbitrary in the disposal of petitioners' contentions and to insinuate that the "integrity of our judicial system" is involved (See Petrs.' brief herein, p. 18). Such charges of judicial misconduct are utterly unfounded.

It is unnecessary to answer the trivial scholasticism that the Court should have discussed its jurisdiction on page one of its opinion instead of disposing of the point at the conclusion. The court below had before it very full briefs on all points presented in the case, including the unmeritorious challenge to its jurisdiction. It is obvious that after the Court fully examined all of the briefs and heard the argument on the merits, it concluded it possessed jurisdiction and proceeded to a decision on the merits and expressly denied the motion to dismiss.

Apparently the substance of petitioner's complaint and the grounds upon which they would have this Court review the case come down to the fact that the Court below did not set out at length its reasons for denying the motion to dismiss.

The Court Below Rejected Petitioners' Contention Upon Which Their Motion to Dismiss Was Based that Duke University Was the Named Beneficiary Under the Will.

In seeking to bring the case within the decisions holding that a mere stakeholder may not appeal, petitioners in their brief below predicated their entire argument upon the assumption that Duke University was a single bene-

ficiary or legatee under the will, so as to make it appear to the Court of Appeals, before the case could be considered upon its merits, that the controversy involved a private dispute between petitioners and Duke University for possession of a legacy renounced by the named legatee and therefore held by the trustees merely as stakeholders. The same contention is urged by petitioners in their brief filed herein (p. 18), where the proposition upon which they place their chief reliance for granting of the writ of certiorari is stated as follows:

> "It is clear that Olds and the Trust Company, as executors and trustees, were not aggrieved by the trial court's decision which merely ordered the payment of the fund renounced by *the named beneficiary* to the next of kin of the testator. As representatives of the estate of the decedent, their powers, duties and privileges must flow from the instrument which they have been designated to administer. Their position should be a neutral one. They are not charged with the duty nor do they have the power to represent the public generally or to advocate their own particular and individual views of public interest." (Italics supplied.)

The record shows that the testamentary trustees have active duties to perform in carrying out the valid charitable trust created by the will. The beneficial interest is not in Duke University but in students of all classes in life who may seek instruction in art and also the general public that may desire to view the objects of art exhibited in the museum (R. 109). The action in the trial court was clearly an adversary proceeding between total strangers to the trust and the trustees with active duties toward parties of an indefinite class who were not before the court and whose interests the trustees were bound to protect. By their motion to dismiss, petitioners simply were seeking to shut off consideration of the case without affording a hearing to any one representing this general class of beneficiaries. The argument seems to answer itself.

In their brief in opposition to the motion to dismiss, the trustees contended that the motion based on such reasoning could not be decided in advance of a hearing on the merits of the questions presented by the appeals, since it involved the construction of the will; that Duke University did not occupy the position of beneficiary, but was a medium through which testator's charitable purposes set forth in the will were to be accomplished, and that it was the duty of the trustees, as parties aggrieved within the meaning of the applicable statute, to appeal from what they considered to be an erroneous decree destroying the trust (see Scott on Trusts, Sec. 178).

Accordingly, the Court below did review the case on the merits and found that the position of Duke University under the will was "more that of a Trustee than the donee of a gift" and that the actual beneficiaries of the charitable trust were intended to be students and other members of the public throughout the South, interested in art, who should visit and use the building. The Court, as if for emphasis, said that Duke University was a trustee with limited powers and not the donee of a gift and that the language of the will would be without meaning if the testator's purpose had been merely to make a gift to Duke University as a single beneficiary (R. 109).

Having so found, it became crystal clear that petitioners' motion to dismiss as to the principal appellants, the Trustees, was based upon an erroneous assumption and was entirely without merit. The contention so persistently advanced by petitioners that a trustee of a perpetual trust for a valid charitable purpose is not a party aggrieved by and may not appeal from a judgment construing the will and holding that the trust thereby created has terminated would seem to border upon the absurd.

There are many, many cases in which trustees and executors have successfully appealed in will construction suits to correct erroneous judgments and to prevent the destruction of their trusts. In *Gearhart* v. *Richardson*, 109 Ohio

St. 418, 142 N. E. 890, a *cy pres* case, the trustee successfully appealed from a decree which terminated a charitable trust. The appellate court said that the judgment was adverse to him in his trust capacity, and as trustee he had as much right and power to appeal as if it had been adverse to him personally. In *Ripley* v. *Brown*, 218 Mass. 33, 105 N. E. 637, it was held that a trustee of a public charitable trust in such circumstances was a person "aggrieved" (the term used in the appeal statute in this case) and entitled to appeal. From a large group of cases, cited to the court below (Tr. pp. 142-150), in which executors and trustees have appealed, the following are selected because the trust was charitable or because the right to appeal was specifically discussed and the type of stakeholder case relied on by petitioners was expressly distinguished.

Re Hubbell's Estate, 121 Cal. App. 38, 8 Pac. 2d 530;
Cheever v. *Washtenaw*, 45 Mich. 6, 7 N.W. 186;
Peoples Bank v. *Trogdon*, 276 Ill. App. 373;
St. James Orphan Asylum v. *Shelby*, 60 Neb. 796, 84 N. W. 273;
Cf. *Webb* v. *Lohnes*, 68 U. S. App. D. C. 310, 96 F. 2d 582.

So far as the University of North Carolina and Rollins College are concerned, many decided cases are clearly to the effect that parties with an interest or right substantially less than that of those two educational institutions in the instant litigation would be aggrieved by a determination such as that made by the trial Court (see Opposition of University of North Carolina to motion to dismiss. R. 96-99.) In this case, these two institutions were directly affected by the erroneous judgment of the District Court, in view of the allegations contained in the trustees' counterclaim, which were admitted by the motion for judgment on the pleadings, that the University of North Carolina and Rollins College were next in line in the mind of the testator, and in view of the trustees' request that one or the other of said institutions be substituted in the place and stead of Duke University.

At the conclusion of its opinion, the Court of Appeals disposed briefly of several minor points which in its judgment did not merit extended discussion. The motion to dismiss was disposed of in similar fashion. Of course the court below did not hold, as petitioners with apparent seriousness now contend, that because it found the decree erroneous it had jurisdiction of the appeal. The discussion of the will and the facts shown by the record in the opinion had already demonstrated the absurdity of the challenge to jurisdiction, and there was no need for further discussion except to point out, as the court did point out, that the matter had received consideration. In view of the fact that the court had proceeded to decide the case on the merits adverse to the contentions advanced by the next of kin in support of their motion to dismiss, the motion obviously had to be denied.

CONCLUSION.

This being a case in which were decided matters of private local law governing the administration of charitable trusts under principles applicable in the District of Columbia, and the only other point being a complaint that the Court, without extended discussion, disposed of an unsubstantial and unmeritorious challenge to its jurisdiction, it is respectfully submitted that there is an entire absence of anything of general importance within the scope of review by this court under its long-standing practice in regard to

District of Columbia matters, and that the Petition for Writ of Certiorari filed herein therefore should be denied.

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